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No. 91-1419

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GUAM HAKUBOTAN, INC.,
Petitioner,
v.
FURUSAWA INVESTMENT CORPORATION, JULALE INVESTMENT CORPORATION, and YASUDA SHOJI KK,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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The Ninth Circuit unambiguously declared that it "reviewed[ed] the appellate division's application of Guam law *de novo*" (App. A at 5a). Respondents Furusawa Investment Corporation, *et al.* ("Furusawa") now urge this Court that the *opposite* is true—that "the Ninth Circuit did not engage in de novo review of Guam law" (Opposition at 13). Petitioner Hakubotan believes that the Ninth Circuit's opinion speaks for itself, and that the Court of Appeals did what it said it did.

In *Guam v. Yang*, 850 F.2d 507, 511 (1988), the Ninth Circuit explained that *de novo* review "accords no deference to interpretations of local law by the Appellate Division of the District Court of Guam." This is exactly what the Ninth Circuit did in this case. It accorded no deference to the Appellate Division's interpretation of the relevant Guam statutes and adopted its own interpretation based on its view of the proper "logic," "economic sense" and "policy" behind the statutes (App. A at 8a, 12a). The Ninth Circuit thus acted in direct contravention of this Court's ruling in *DeCastro v. Board of Commissioners*, 322 U.S. 451, 456 (1944), which permits reversal "only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community."

Respondents attempt to disguise the true nature of the Ninth Circuit's ruling by making two arguments. They claim first that the Ninth Circuit did not engage in a *de novo* review because, although the issues in the case are heavily "fact-dependent," these facts are undisputed and can be determined as a matter of law (Opposition at 3, 9). But as discussed in the Petition, the relevant facts were sharply disputed by the parties at trial (Petition at 20). Key among these disputed facts were those relating to the parties' intent, which, as the Ninth Circuit concedes, is a central issue in determining whether the deed was actually a mortgage (App. A at 7a).[1] The Ninth Circuit simply disagreed with the trial court's assessment of the evidence on intent, substituting its own

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[1] The question of intent must be examined in light of the peculiar history and culture of Guam, which has roots in Spanish and Chamorro culture and close proximity to and ties with Asia. For example, the principals in Hakubotan and Furusawa are Japanese, and deeds of the sort at issue in this case are common *security* devices well-known to Japanese businesspeople. John Haley, The Preliminary Contract for Substitute Performance: A Reflection of Japanese Judicial Approach, *Law in Japan*, Volume 7 (1974).

"more logical" and "economically sensible" view of the evidence (App. A at 8a). This of course is not only contrary to *DeCastro v. Board of Commissioners*, but violates Rule 52 of the Federal Rules of Civil Procedure as well.

Furusawa also argues that the controlling law is clear, well-established and undisputed and that the Guam courts "misapplied *existing* legal precedent" (Opposition at 8, 13-17) (original emphasis). Here again, the argument cannot withstand scrutiny. The authorities construed by the Guam courts, and those relied upon by the Ninth Circuit, are old California opinions that are rooted in the peculiar facts of each case. Moreover, the holdings of the cases are not easily reconcilable. Contrary to Furusawa's claim, there is no simple "black-letter" rule of law that can be easily applied in this case. The Guam courts devoted considerable effort to the task of construing the California cases in the context of modern Guam in a way that would do justice to the territory's unique policies and concerns (see, e.g., App. C at 25a-34a). This is the essence of territorial self-rule, which Congress mandated in the Organic Act of Guam,[2] which this Court sought to preserve in *DeCastro v. Board of Commissioners*, and which the Ninth Circuit has cavalierly swept aside.

Furusawa's argument relies on a mischaracterization of the role of pre-1933 California precedent in Guam. Respondents argue that the Guam courts must decide every case in conformity with California decisions dating from the Great Depression and before (Opposition at 2). However, Guam is not a territory of California, forever obliged to parrot California opinions of fifty years ago. Under the Organic Act, it is a territory enjoying a status similar to that of a state, with its own legislature, courts, and laws, and is free to decide cases in light of its unique needs and policies.

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[2] Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421-1428).

Adoption of another forum's statute does not inflexibly impose the original forum's construction upon the adopting forum's courts. Borrowing a statute at most creates a presumption that the adopting forum also imports the construction of the adopted statute. 2B Sutherland Statutory Construction § 52.02 at 199 (5th ed. 1991). As this court has recognized, the adopting government is free to ignore this presumption and to distinguish or depart from the prior construction. *See, e.g., Whitney v. Fox*, 166 U.S. 637, 647 (1897) (Utah *territorial* court may depart from California Supreme Court interpretation of statute borrowed from California); *see also State v. Tramble*, 144 Ariz. 48, 695 P.2d 737, 740 (1985); *Zerbe v State*, 583 P.2d 845, 846-47 (Alaska 1978); *Blount v. T.D. Publishing Corp.*, 77 N.M. 384, 423 P.2d 421, 425 (1966).[3]

Furusawa also places great weight on the Ninth Circuit's holding that "the conveyance did not occur until the deed was recorded" (App. A at 9a). Respondents argue that the failure of the Guam courts to apply this undisputed "existing legal principle" constituted clear error and required the Ninth Circuit to reverse even under *DeCastro v. Board of Commissioners* (Opposition at 15-17). However, the Ninth Circuit created this "principle" out of whole cloth, without citing to Guam, California or any other authority (see App. A at 9a). Although Furu-

[3] The seminal Ninth Circuit case on this issue, *United States v. Johnson*, 181 F.2d 577 (1950), did *not* hold that pre-1933 California law governs construction of the Guam codes. Rather, *Johnson* simply notes that Guam had adopted the California Civil Code and that California law was "a convenient starting point" for analysis of the Guam codes. *Id.* at 580-81. Furthermore, the opinion observes that the drafter of the Guam codes, a Navy Captain, testified before Congress that the California codes were adopted to give the Guam bar the benefit of pre-existing library materials and "reference" to some interpretations, *id.* at 580 n.3, thus demonstrating an intent to use California law as a guide and not as a straitjacket. *See Carolene Prod. Co. v. United States*, 323 U.S. 18, 26 (1944) (presumption to apply original jurisdiction's interpretations varies according to intent to do so).

sawa devotes several pages in its opposition to this issue (Opposition at 9-10, 15-16), tellingly, respondents also fail to come forward with any authority for the "principle." The simple reason is that this is not the law in either California or Guam. Moreover, Guam Civil Code section 1056, which is identical to California Civil Code section 1056, provides that

> A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

Thus, if "[t]he essential factor the court must consider in scrutinizing a deed is whether the debt or debtor-creditor relationship effectively continues after the conveyance" (App. A at 9a), there can be no doubt that the Guam courts were correct in holding that the "mortgagor/mortgagee relationship" continued after Hakubotan gave the deed to Furusawa (App. C at 36a; see App. B at 18a).

Of course, the correctness of specific local law determinations by the Ninth Circuit are not, and should not be, the subject of Hakubotan's Petition. We raise them only in response to Furusawa's effort to disguise the true nature of the Ninth Circuit's opinion. As we have demonstrated, the Ninth Circuit has completely usurped the proper role of the Guam courts in developing their own body of law responsive to local needs and conditions. It has brazenly substituted its own policy views for those of the Guam courts and has flown in the face of this Court's long-standing rule of deference as stated in *DeCastro v. Board of Commissioners*. This usurpation of territorial authority must be halted. That the Ninth Circuit's opinion is legally in error only adds a further reason for this Court to act.

Respectfully submitted,

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